STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: U S WEST COMMUNICATIONS, INC., n/k/a QWEST CORPORATION	DOCKET NOS. INU-00-3 WRU-99-8-272 WRU-00-88-272

ORDER DENYING REHEARING AND STAY

(Issued April 13, 2001)

INTRODUCTION

On February 23, 2001, the Utilities Board (Board) issued an order identified as Docket No. INU-00-3, granting a petition for deregulation filed by U S WEST Communications, Inc., n/k/a Qwest Corporation (Qwest). In its petition, Qwest sought deregulation of local directory assistance (DA) services, pursuant to Iowa Code § 476.1D (2001). The Board found, based on the record made in this proceeding, local DA service to be subject to effective competition. Based on that finding the Board ordered local DA service deregulated effective upon removal of the service from a utility's tariffs.

On March 15, 2001, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed an application for rehearing and stay, pursuant to Iowa Code § 476.12 (2001), and an application for stay pending judicial review, pursuant to Iowa Code § 17A.19(5) (2001). Consumer Advocate asks the Board to consider or reconsider, and incorporate, each of Consumer Advocate's arguments in its statement of position, counter-statement of position, initial brief, reply brief, and all

evidence presented it the proceeding. Consumer Advocate also asks that the Board enlarge its findings of fact and conclusions of law.

On March 27, 2001, Qwest Corporation (Qwest) filed its response to the Consumer Advocate's application for rehearing and stay. Qwest maintains that the Board's February 23, 2001, order sufficiently states the factual and legal reasons for its decision. Although Consumer Advocate disagrees with the Board's decision, Qwest suggests that it fails to meet its substantial burden on rehearing to demonstrate any invalidity of the Board's order. The Board did precisely what it is legislatively mandated to do: deregulate local DA services in the face of overwhelming evidence there is effective competition for such services. Accordingly, Qwest urges the Board deny Consumer Advocate's application in its entirety.

On March 29, 2001, Consumer Advocate filed a reply on application for rehearing and stay.

IS THERE A PROCEDURAL BASIS FOR REHEARING?

Qwest contends that there is no procedural basis for hearing in this matter. The Board has previously opined in Docket No. INU-99-3 that:

> Iowa Code § 17A.2(5) defines a contested case as a "proceeding in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing." Thus, if the Constitution or a statute requires that the Board hold an evidentiary hearing in a deregulation docket, the matter is a contested case.
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> Iowa Code § 476.1D provides for deregulation of competitive telecommunications services based upon a Board "determination" of effective competition. The statute does not expressly require an evidentiary hearing, and in the past the Board has deregulated services through rule making

proceedings. See, for example, Docket No. RMU-85-6 (deregulating pay phones), Docket No. RMU-85-23 (deregulating riser cable), and Docket No. RMU-86-16 (deregulating most billing and collection services). Thus, the statute does not require that the Board hold an evidentiary hearing as a part of telecommunications deregulation.

The Constitution does not require a hearing in this matter, either. Article I, § 9 of the Iowa Constitution provides in relevant part that "no person shall be deprived of life, liberty, or property, without due process of law." Assuming that this right extends to corporate entities such as U S West, the fact remains that a Board decision to deregulate does not, by itself, deprive any entity of life, liberty, or property. A telecommunications utility is not required to deregulate its facilities after the Board issues its finding. Deregulation of a service or facility for a utility is only effective after the utility elects to file a deregulation accounting plan, pursuant to Iowa Code § 476.1D(2)"b." In the absence of such an election, the telecommunications service continues to be regulated, as it was prior to the Board determination, so the Board decision, by itself, does not and cannot deprive any person of any property interest.

Thus, a deregulation proceeding is not a contested case because neither the Constitution nor any statute requires an opportunity for evidentiary hearing as a part of the proceeding.

This leaves the question of whether reconsideration is available in a non-contested case proceeding. In the past, the Board has sometimes applied a policy that rehearing is not generally available in proceedings other than contested cases.

. . .

To summarize, there is no explicit statutory prohibition against reconsideration in other agency action; it is a policy based on the Board's construction of the statute, finding an implicit prohibition based on the fact that Iowa Code § 476.12 refers only to rehearing in contested cases and is silent with respect to other agency action.

The Board finds nothing that causes it to reconsider its previous decision that proceedings under Iowa Code § 476.1D (2001) are not contested cases subject to rehearing under Iowa Code § 476.12 (2001). However, regardless of that finding, were the Board to grant rehearing on this matter it would deny the request for the reasons described below.

ARE MARKET FORCES SUFFICIENT TO ASSURE JUST AND REASONABLE RATES?

Consumer Advocate indicates the Board's statement on page three of the order that market forces "should be" sufficient to assure just and reasonable rates is unclear, that the Board's statement on page three of the order, "that deregulation does not always correspond to lower prices" does not support a determination that 411 service is subject to effective competition, and that the statement on page four of the order that, "[T]he Board, as well as the Consumer Advocate, can only speculate as to what deregulating directory assistance will do to market rates" is legally infirm.

Iowa Code § 476.1D requires a two-pronged test to determine the existence of "effective competition." The first test, "whether a comparable service or facility is available from a supplier other than the telephone utility," is the easier of the two tests to satisfy. In a strict sense, it requires a minimum of only one other supplier to satisfy the test. The Board, on page three of the February 23, 2001, order, definitively stated that this test was satisfied.

The second test for "effective competition" in Iowa Code § 476.1D is "whether market forces are sufficient to assure just and reasonable rates without regulation." The language in the order that "market forces should be sufficient to assure just and

reasonable rates" or "that deregulation does not always correspond to lower prices" should not be construed to mean that the Board deregulated the service without due consideration. Rather, such language reflects the difficulty of the decision. It also reflects the Board's realization, that although current market forces are sufficient to assure just and reasonable rates without regulation, it is always possible that the situation could change in the future.

Iowa Code § 476.1D (2001) does not require the Board to know with absolute certainty what will happen to rates in the future. Although the Board found that current market forces are sufficient to assure just and reasonable rates, the Board also believes that market forces will benefit from the deregulation of local directory assistance.

DID THE BOARD OVERLOOK EVIDENCE PROVIDED BY CONSUMER ADVOCATE?

Consumer Advocate states that the order overlooks evidence presented by Consumer Advocate that prices for directory assistance have been rising dramatically for years. Consumer Advocate also believes that the order overlooks the dominant theme in its case - that competition holds price to cost, including a reasonable return on capital.

Consumer Advocate appears to believe that because the Board did not specifically address certain issues in the deregulation order, Consumer Advocate's evidence was overlooked. Witness Drennan testified that competition "drives prices towards cost, not away from cost." (Tr. 503). However, the record indicates that some directory assistance companies provide additional features, with additional

costs, thus their prices would be higher. (Tr. 504). Both Qwest and Consumer Advocate seem to agree that obtaining accurate call volume data from other directory assistance companies would be difficult. (Tr. 515-16). Such data would show whether prices are being driven towards cost or away from cost in the overall directory assistance market.

Witness Gordon testified that in the "increasingly differentiated product market, economists would expect to see greater price variation as firms compete vigorously to maximize their profit through advertising, product development, and other means." Witness Gordon noted that competition "drives prices to a competitive level that, in real-world markets, means that prices will often exceed marginal costs to recover contribution to the firm's forward-looking fixed costs." He further testified that the degree of departure from marginal cost pricing, "is governed by market conditions and specifically in ways that recognize the value consumers receive from a particular service they choose to buy." (Tr. 212).

Thus, it is not that the Board overlooked Witness Drennan's testimony. In balancing Witness Drennan's testimony against Witness Gordon's testimony, the Board assigned more weight to the latter, because it better reflected the realities of a value-sensitive as well as price-sensitive competitive marketplace.

IS AN ASSESSMENT OF MARKET POWER REQUIRED TO DEREGULATE?

Consumer Advocate states that Iowa Code § 476.1D (2001) essentially requires an assessment of market power. According to its motion, the order, on page 3, begins with a true factual premise that customers may obtain local phone numbers from companies such as AT&T Communications of the Midwest Inc. and

WorldCom, Inc. and then jumps to the erroneous legal conclusion that "directory assistance obtained by dialing 411 is not a local market, but instead is part of a national market." Consumer Advocate asserts that this statement overlooks the fact that consumers cannot purchase 411 on a stand-alone basis.

As dictated by statute, what is required to deregulate is a determination by the Board of effective competition after giving consideration to, among other factors:

- Whether a comparable service or facility is available from a supplier other than the telephone utility, and
- Whether market forces are sufficient to ensure just and reasonable rates without regulation.

There is no statutory or administrative law that explicitly ties the Board's judgment in considering these factors to specific types of market share studies. Nor do the parties agree as to the degree such studies are necessary before rendering a judgment. While the Board has in the past, and in this present case, taken into account market share data that exists in the record, its decision is not limited only to such data. Decisions are based upon a mix of qualitative and quantitative findings. In any case, the Board has considered the whole record, including the arguments pro and con about market share, ability to influence price, market entry, and substitutability in judging that market forces are sufficient.

DOES THE BOARD HAVE THE AUTHORITY TO WAIVE THE ACCOUNTING PLAN REQUIREMENTS?

The order, on pages 6-7, continues the previous waiver of the accounting plan requirement of Iowa Code § 476.1D(2)"c". Consumer Advocate asserts the waiver should be withdrawn because the accounting plan requirements are a statutory

requirement that the Board lacks authority to waive. Additionally, the accounting plan would serve the purpose of facilitating Consumer Advocate's report to the Legislature pursuant to Iowa Code § 476.98.

Qwest notes that the Board previously waived the accounting plan requirements for the deregulation of directory assistance in Docket No. WRU-99-8-272. Since Consumer Advocate did not contend that the Board lacked authority at that time, it has waived the argument. In addition, the Board has deregulated other services without requiring an accounting plan and Consumer Advocate did not object to those waivers. Finally, according to Qwest's filing, Consumer Advocate and Consumer Advocate's consultant recently met and reached agreement as to what data Consumer Advocate requires to complete its report to the Legislature. Accounting plans for deregulated services are not part of the required data.

Both Iowa Code § 476.1D and 199 IAC 5.7 require that the company file and the Board approve a deregulation accounting plan. Qwest requested the Board waive the requirement to file a deregulation accounting plan based upon the fact that its prices are established by other than rate-of-return regulation (Tr. 10-11). Consumer Advocate did not address the issue in its testimony.

In Docket No. WRU-99-8-272, Qwest filed a request for a waiver of the accounting plan requirements under 199 IAC 5.7 in connection with the deregulation of several telecommunications services including directory assistance. Rule 5.7 provides that deregulation of a telecommunications service or facility will be effective only after all of the following have occurred: (a) a finding of effective competition by

the Board; (b) filing of a deregulation accounting plan by the utility; and (c) approval of the deregulation accounting plan by the Board.

In its order dated March 12, 1999, in Docket No. WRU-99-8-272, the Board found good cause for granting the waiver. With Qwest operating under price regulation, a deregulation accounting plan would have served no useful purpose, because Qwest rates were not based on its current cost of providing service. In granting the waiver the Board also clarified that it did not have the authority to waive the statutory requirements of Iowa Code § 476.1D. Nevertheless the Board indicated it had the authority to approve the required deregulation accounting plan and it had the authority to determine the form and content requirements of the plan. The Board also indicated that in interpreting the statutory requirements for an accounting plan, it must discern and accomplish the Legislature's purpose.

The Board noted that the price regulation statute, Iowa Code § 476.97, was enacted after the deregulation statute, Iowa Code § 476.1D. Thus, when the Legislature enacted the deregulation statute, there was no provision for price regulation. Therefore, the Legislature must have contemplated the deregulation of services by telephone utilities that were still subject to rate regulation. Finally, the Board ruled that the later intent of the Legislature must prevail over the literal words of Iowa Code § 476.1D, when the effect of the later legislation is to make the old requirement meaningless.

The Board's rationale for granting a waiver of the accounting plan requirements in Docket No. WRU-99-8-272 continues to apply here, and the Board simply continued the previous grant of waiver. Qwest is still operating under price regulation and a

deregulation accounting plan would serve no useful purpose, because Qwest's rates are not based on its current cost of providing service.

SHOULD THE BOARD HAVE RULED ON CONSUMER ADVOCATE'S MOTIONS TO COMPEL AND MOTION TO STRIKE?

Consumer Advocate asks the Board to rule on its second motion to compel, filed August 16, 2000, supplemented August 23, 2000, its third motion to compel, filed August 21, 2000, and its motion to strike, filed November 3, 2000.

There was a brief discussion during the two-day oral presentation as to the continuing necessity of these motions to compel. At no time did Consumer Advocate indicate that the information was necessary for it to present its case. During the time this docket was pending, there were numerous motions to compel, responses to motions to compel, resistances to motions to compel, replies to responses to resistances to motions to compel, etc. Before the Board had a reasonable time to rule on any of these motions, another round of replies or resistances was filed. Following that, several of the motions to compel were then withdrawn. It is more than reasonable to assume that if a party intended to rely on information that might be provided pursuant to a motion to compel, it should have raised the issue at the time of the oral presentation. Once the Board closed the record, the issue became moot.

OTHER ISSUES

Consumer Advocate points out that the order, on pages 3, 4, and 6, states that many of the offerings of "competitors" provide "options" that consumers should be able to "choose," including "call completion, yellow page searches, reverse searches, etc." At the oral presentation, however, the Board recognized that DA bundling robs

customers of choice. (Tr. 178-79, 181). The order does not say how "bundled" offerings support a determination that market forces are sufficient to assure just and reasonable rates or a determination of effective competition.

Additionally, the order, on page 6, states that, "The Board is hopeful that lower cost directory assistance services will emerge if demand is adequate." Consumer Advocate states that "hope" does not assure just and reasonable rates and "hope" does not discharge the responsibility placed upon the Board's shoulders.

The Board's expressed expectation for innovation under competition is not unreasonable and is consistent with its decision to deregulate local DA. While there is uncertainty as to exactly what types of products and/or service will evolve, it is reasonable to expect the market dynamics of an unregulated industry to try new things.

REQUEST FOR STAY

The Board is authorized to stay its action pending judicial review upon consideration and balance of the following factors: (1) the extent to which Consumer Advocate is likely to prevail on the merits; (2) the extent to which the applicant will suffer irreparable injury if relief is not granted; (3) the extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings; and (4) the extent to which the public interest relied on by the agency is sufficient to justify the agency's action in the circumstances.[1]

[1] Iowa Code § 17A.19(5)"c" (2001).

As fully discussed above, the Board does not find that there is any likelihood that Consumer Advocate will prevail on the merits. As Qwest has pointed out, if Consumer Advocate were to ultimately prevail, some requirement could be placed upon it by the court to refund any additional revenue it obtained as a result of what was later determined to be an invalid deregulation order. This does not constitute "irreparable harm" to the consumers.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The application for rehearing filed by the Consumer Advocate Division of the Department of Justice on March 15, 2001, is denied.

2. The request that the Board stay its order pending judicial review filed by the Consumer Advocate Division of the Department of Justice on March 15, 2001, is denied.

UTILITIES BOARD

/s/ Allan T. Thoms

/s/ Susan J. Frye

ATTEST:

/s/ Judi K. Cooper
Acting Executive Secretary

/s/ Diane Munns

Dated at Des Moines, Iowa, this 13th day of April, 2001.